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No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1986

WALTER J. KELLY, Superintendent,
Attica Correctional Facility,
and STATE OF NEW YORK,

Petitioners,

-against-

GREGORY JOHNSTONE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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50pp

QUESTIONS PRESENTED

1. Assuming that the petitioner was denied the opportunity to proceed pro se at his state trial, does a decision which obligates the state to provide petitioner a second trial with an attorney violate appropriate norms of comity and Sixth Amendment remedial action?

2. Is a state court finding that a defendant has not unequivocally sought pro se representation a finding of fact which, in a habeas corpus proceeding, must be presumed correct?

3. Has a criminal defendant who on the day of trial asks to proceed pro se only because he wrongly believes that an appellate court will reverse his conviction and provide him with new

counsel made an unequivocal knowing and voluntary waiver of his right to counsel?

4. If habeas corpus is a proceeding in equity, and the petitioner's guilt was conclusively established at a full and fair state trial, does a district judge have the discretion to consider that his representation by counsel was "harmless error" and not issue the writ?

TABLE OF AUTHORITIES

Cases:

Statutes:

Other:

TABLE OF CONTENTS

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The New York County District Attorney, on behalf of the State of New York and Walter J. Kelly, Superintendent of Attica Correctional Facility,

petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. Exh. A, pp. 1-11)* is reported at 808 F.2d 214. The opinion of the Second Circuit on the post-judgment motion for clarification (App. Exh. B, pp. 12-14) is not reported. The opinion of the United States District Court for the Southern District of New York (App. Exh. C, pp. 15-43) is reported at 633 F.Supp. 1245. The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 106 A.D.2d 924,

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*The Appendix to the petition is separately bound.

484 N.Y.S.2d 1020. The order of Judge Judith S. Kaye denying leave to appeal to the New York Court of Appeals is reported at 64 N.Y.2d 1135, 490 N.Y.S.2d 1030.

JURISDICTION

The judgment of the Court of Appeals was entered on December 24, 1986 (App. Exh. D, p. 44). The motion for clarification was denied on March 2, 1987 (App. Exh. B, pp. 12-14). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The time for filing a petition for certiorari has been extended to April 23, 1987, by order of the Honorable Thurgood Marshall.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ... Nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence.

28 U.S.C. section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. section 2254(d) provides, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct....

28 U.S.C. section 2243 provides, in pertinent part:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT OF THE CASE

During the early hours of November 16, 1980, Gregory Johnstone, who was seventeen years old and

accompanied by two younger children, broke into an apartment building in upper Manhattan. Johnstone and his accomplices set a fire using flammable liquids, and then fled the building. The resulting fire destroyed one apartment and damaged others. Several tenants and a firefighter suffered injuries from burns and smoke inhalation.

Johnstone was arrested, indicted, and brought to trial. His first trial, from October 23 to November 10, 1981, resulted in a hung jury. Johnstone was represented by state-assigned counsel at that trial.

At the outset of the second trial, on January 5, 1982, Johnstone sought to have the court replace the assigned attorney. When that applica-

tion was denied Johnstone declared that he wanted to proceed to trial without counsel because he believed that an appellate court would reverse his conviction and he would get new counsel for a retrial (App. Exh. E, pp. 52, 62-64, Tr. 6, 12-13). He also insisted that he was "not going to represent myself" or otherwise participate at the trial (App. Exh. E, pp. 48, 52, Tr. 3, 6). After questioning Johnstone, the judge refused to permit Johnstone to proceed pro se. The judge directed the assigned attorney to follow Johnstone's instructions regarding any strategy for the defense, including not participating. The court and Johnstone's attorney viewed Johnstone's request to proceed pro se as an effort to obtain substitute counsel (App. Exh. E, pp. 73-74, Tr. 20).

The next day, January 6, the judge denied Johnstone's request "to do some speaking myself" during the trial, suggesting that the defense should "try" cross-examination through assigned counsel to "see how it works out." The judge denied Johnstone permission to make an opening statement, but permitted him to sum up personally rather than through counsel.

Johnstone was convicted and sentenced to concurrent terms of from three to nine years for convictions of second degree arson and first degree burglary. He is now on parole.

THE STATE APPEAL

On direct appeal Johnstone contended, inter alia, that he was denied the right to represent himself.

The state contended that the application to proceed pro se was equivocal. The state argued that the purported waiver was a deliberate effort by Johnstone to manipulate the judicial process to obtain his true goal, a new attorney. The Appellate Division, First Department, affirmed the conviction without opinion. Permission for leave to appeal to the New York Court of Appeals was denied.

THE FEDERAL HABEAS CORPUS PROCEEDING

The District Court

By a petition filed on December 3, 1985, Johnstone sought a writ of habeas corpus from the United States District Court for the Southern District of New York. In the petition, Johnstone contended that the state

violated his constitutional rights "by denying petitioner's knowing and unequivocal request to proceed pro se." In response, the state again contended that the request was, as a tactic to obtain new counsel, equivocal and not a knowing or intelligent waiver of the right to counsel.

After a de novo review of the transcript of the state proceedings, District Judge Charles L. Brieant concluded that there had been a voluntary and unequivocal waiver of the right to counsel, even if Johnstone's intent was to "parlay his pro se defense into a mistrial and reversal and ultimately, a new lawyer" (App. Exh. C, p. 32). However, Judge Brieant further concluded that, because "guilt in this case is clear," the error in refusing to

allow Johnstone to represent himself was subject to harmless constitutional error analysis (App. Exh. C, p. 35).

In doing so, Judge Brieant noted an apparent inconsistency in Sixth Amendment error analysis between a footnote in McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 950 n.8, 79 L.Ed.2d 122, 133 n.8 (1984) (right to proceed pro se) and Delaware v. Van Arsdall _____ U.S. _____, ___, 106 S.Ct. 1431, 1433, 89 L.Ed.2d 674, 680 (1986) (right to confrontation). Concluding that a harmless error test was permissible on habeas corpus review, Judge Brieant found that denial of Johnson's right to represent himself was harmless error beyond a reasonable doubt, and denied the petition, but

issued a certificate of probable cause to appeal.

The Second Circuit

On appeal to the United States Court of Appeals for the Second Circuit, Johnstone contended that denial of the right to proceed pro se was "never" subject to harmless error analysis. The state, noting that the state judge's factual finding should have been presumed correct, contended that Johnstone's effort to manipulate the judicial process was not an unequivocal waiver of the right to counsel. In addition, the state contended that harmless error analysis should apply.

In an opinion by Judge Jon O. Newman, the Second Circuit concluded that Johnstone's waiver of counsel was valid. The court recognized that the

United States Supreme Court "has never directly confronted the question" whether harmless error analysis would be applicable to waiver of the right to counsel (App. Exh. A, p. 7). However, the court relied upon language in McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S.Ct. 944, 950 n.8, 78 L.Ed.2d 122, 133 n.8 (1984), and Flanagan v. United States, 465 U.S. 259, 267-268, 104 S.Ct. 1051, 1056, 78 L.Ed.2d 288, 296 (1984), to conclude that harmless error analysis would "never" be available. For that reason, the Second Circuit directed Judge Brieant "to order the petitioner's release unless the State promptly affords him a new trial" (App. Exh. A, p. 11).

Thereafter, the state moved for clarification of the Second

Circuit's judgment. Noting that Johnstone's claim was only that he had lost the right to proceed pro se, the state argued that the only reasonable relief to afford him was a retrial at which he would proceed pro se. The state pointed to United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564, 568 (1981), which declared that, with respect to Sixth Amendment deprivations, "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."

In an opinion, the Second Circuit ignored Morrison and concluded that, although Johnstone had received one trial with the full assistance of counsel, the state was obligated to

afford Johnstone a new trial with counsel (App. Exh. B).

REASONS FOR GRANTING THE WRIT

1. The decision in this case transforms federal habeas corpus review of state convictions into no less than the power to exercise broad supervisory authority over the state courts. Johnstone was tried with the assistance of counsel. He premised his habeas corpus petition on the ground that he was wrongly refused the right to dismiss the attorney and proceed pro se. Logic, law, and justice dictate that if Johnstone is correct, then the appropriate remedy is to afford him only the opportunity to proceed pro se. The Second Circuit has declared, however,

that the state is obligated to afford Johnstone a second counselled trial if he so chooses. This exercise of excessive remedial authority raises an important question that this Court should accept for review.

Primarily, we believe that the remedy imposed by the Second Circuit was plainly beyond that required. With respect to Sixth Amendment analysis the federal court unfairly is forcing the state to provide a prophylactic remedy that goes beyond the "injury suffered." United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564, 568 (1981); see also Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). In Morrison, this Court squarely addressed what the Constitution

requires when the Sixth Amendment Right to Counsel is violated. There, federal agents approached and obtained statements from an indicted defendant in the absence of counsel. The Third Circuit concluded that dismissal of the indictment was the required remedy.

This Court reversed, declaring that "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." 449 U.S. at 364, 101 S.Ct. at 667, 66 L.Ed.2d at 568. Here, because the loss to Johnstone was no more than a pro se trial, that is the sum and substance

that the Sixth Amendment ordains be provided him to make him whole.*

Further, and importantly, the Second Circuit has undertaken this expansion of Sixth Amendment remedial analysis in the context of a collateral habeas corpus proceeding. It is our position that proper respect for the states' processes means that the remedies fashioned by federal courts are limited by what "law and justice require," 28 U.S.C. § 2243, and neither law nor justice requires a remedy that

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*We should note that the only express discussion on remedy in a pro se representation case that we have found was in a dissent in a New York state case. People v. Smith, 68 N.Y.2d 737, 739, 743-744, 506 N.Y.S.2d 322, 323, 326, 497 N.E.2d 689, 690, 693 (1986), cert denied, ___ U.S. ___, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986). The issue of remedy, however, was not one of the questions presented in the petition for certiorari made to this Court.

goes beyond that which was lost to a criminal defendant. Cf. Dowd v. United States ex rel. Cook, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215 (1951) (where state defendant denied state appeal, appropriate remedy not new trial or release, but appellate review or release). Although concededly this rule has never been so explicitly stated by this Court, we believe that it is the proper rule to be drawn from this Court's review of habeas corpus cases. See Boles v. Stevenson, 379 U.S. 43, 45-46, 85 S.Ct. 174, 176, 13 L.Ed.2d 109, 111 (1964) (retrial or release too strict a remedy); See also Francis v. Henderson, 425 U.S. 536, 541-542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149, 154 (1976) (federal rights should be vindicated in a manner which does not

unduly interfere with the states).

However, even if we are incorrect in our view, this case provides the Court with the opportunity to clarify the limits of the remedial action that a federal court may impose on the state in a habeas corpus proceeding. 28 U.S.C. section 2243 requires that a petition be disposed of as "law and justice require." Although more than fifty cases in this Court have referred to the phrase "law and justice require," the efforts to interpret it have been tentative and inconsistent.*

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*See, e.g., Kuhlmann v. Wilson, ___ U.S. ____, ___ n.11, 106 S.Ct. 2616, 2625 n.11, 91 L.Ed.2d 364, 378 n.11 (1986) (plurality)(implicates sensitivity to competing interests); Smith v. Murray, ___ U.S. ___, ___, ___, 106 S.Ct. 2661, 2669-2675, 91 L.Ed.2d 434, 448-455 (1986) (Stevens, J., dissenting) (in procedural default

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This Court's own varied view justifies review in this case.

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context requires consideration of type of claim); Murray v. Carrier, ____ U.S. ___, ___, ___, 106 S.Ct. 2639, 2650, 2652-2653, 91 L.Ed.2d 397, 414, 415-417 (1986) (Stevens, J., concurring) (same); Stone v. Powell, 428 U.S. 465, 473 n.11, 96 S.Ct. 3037, 3044 n.11, 49 L.Ed.2d 1067, 1078 n.11 (1976)(represents a broad power, but equitable considerations may limit its exercise); Peyton v. Rowe, 391 U.S. 54, 66-67, 88 S.Ct. 1549, 1556, 20 L.Ed.2d 426, 434 (1968) (permits "appropriate relief" other than immediate release); Fay v. Noia, 372 U.S. 391, 430-431, 83 S.Ct.822, 844, 9 L.Ed.2d 837, 864 (1963) (permits federal court only to order release); Salinger v. Loisel, 265 U.S. 224, 231, 44 S.Ct. 519, 521, 68 L.Ed. 989, 996 (1924) (lays down no specific rule); Storti v. Massachusetts, 183 U.S. 138, 143, 22 S.Ct. 72, 74, 46 L.Ed. 120, 124 (1901) (calls for "substantial justice" to result); In Re Bonner, 151 U.S. 242, 261, 14 S.Ct. 323, 327, 38 L.Ed. 149, 153(1894) (invests court with "largest" power to control form of judgment).

2. In Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581, this Court pointed to Johnson v. Zerbst, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938), as providing the test for whether the right to counsel is truly being waived. That test, in turn, presumes against waiver of counsel and obligates the state to meet a heavy burden to show that there has been a waiver of counsel. Of course, although each case depends highly on its factual circumstances, neither Faretta, a non-habeas corpus case, nor McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the only other case in this Court to focus on pro se representation, addressed two questions of critical concern to habeas corpus

proceedings. Both questions of which are presented herein.

The first question is whether the existence of a valid waiver of representation is essentially a question of fact. If it is, as we believe, then we are faced with a federal court that declined to place credence on the state factual finding that Johnstone's request was not a bona fide desire to proceed without counsel. Despite being reminded by the state of its obligation to presume that the facts found by the state court were correct, the Second Circuit did no more analysis than agree with the district judge's de novo review of the cold record. The court thus failed to accord presumptive weight to the state judge's conclusion that Johnstone's request was not a true

waiver of counsel, but was an effort to gain new counsel. That result is inconsistent with the commands of 28 U.S.C. section 2554(d) and of this Court, e.g., Miller v. Fenton, 472 U.S. 1025, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

Simply put, whether a defendant is unequivocally seeking to represent himself is essentially a question of fact. Like questions of a defendant's competency, Maggio v. Fulford, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983) or understanding, Marshall v. Lonberger, 459 U.S. 422, 431-437, 103 S.Ct. 843, 849-852, 74 L.Ed.2d 646, 656-661 (1983), or the mental state of a juror, Patton v. Yount, 467 U.S. 1025, 104 S.Ct 2885, 81 L.Ed.2d 847 (1984), the state of

Johnstone's mind was uniquely a factual question best considered by the state judge who interviewed him. His conclusion, assented to by the assigned attorney, was entitled to presumptive weight.* We recognize, of course, that the validity of waivers of counsel that take place outside a courtroom are mixed questions of law and fact. Brewer v. Williams, 430 U.S. 387, 403-404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424, 439 (1977), and that at least one circuit apparently has applied that rule to the

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*Even more frustrating to us is that although the Second Circuit ignored its obligation to presume the state court correct in this habeas corpus proceeding, it has held this precise issue to be a "question of fact" in its direct review of federal prosecutions. United States v. Tompkins 623 F2d 82, 829 (2d Cir. 1980), on remand, 541 F.Supp. 799 (W.D.N.Y. 1982), aff'd, 729 F.2d 1440 (2d Cir. 1983).

waiver of counsel in pro se request cases, Fitzpatrick v. Wainwright, 800 F.2d 1057, 1063 (11th Cir. 1986). However, we ask this Court to clarify whether an in-court determination of a waiver of counsel by a judge who has questioned the defendant is not a question of fact different from the type of question presented when a court determines whether counsel was waived during events that occur outside a courtroom.

3. Further, even if it were plain that whether a pro se request is unequivocal is a legal rather than a factual question, this case merits review. As Justice Blackmun noted in his dissent in Faretta, the question of how waiver is to be "measured" was left

open in that case. 422 U.S. at 852, 95 S.Ct. at 2549, 45 L.Ed.2d at 592. The need for clarification is evidenced by the disagreement between the state and the federal courts in their approach to this case.

Essentially, the federal courts in this case concluded that the mere mouthing of the words, "I want to proceed pro se," regardless of the context of those words or the reason they were uttered, constitutes an unequivocal request. However, Faretta mandates more in its requirement that the waiver of counsel be knowing and voluntary.

In fact, the district judge's and Second Circuit's reliance on the mere mouthing of Johnstone's request and the state judge's warnings stands in

stark contrast to the recent conclusion of the 11th Circuit that it is not the "court's express advice, but rather the defendant's understanding" that controls. Fitzpatrick v. Wainwright, 800 F.2d 1057, supra. It stands in contrast as well to this Court's command in Faretta that a waiver cannot be accepted unless the judge is assured that the defendant makes it with his "eyes open." 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 582.*

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*Indeed, the facts here are similar to other cases where the request to proceed pro se is made only because of dissatisfaction with assigned counsel. Unlike the Second Circuit, other courts have been adverse to finding a waiver of counsel in this situation. United States v. Welty, 674 F.2d 185 (3d Cir. 1982); Peede v. State, 474 So.2d 808 (Fla. 1985) cert. denied, ___ U.S.___, 106 S.Ct.___, 91 L.Ed.2d 575 (1986); Hinton v. State, 473 So.2d

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It is true that, standing alone, the fate of Johnstone would not justify further review. However, the facts of this case provide this Court with an opportunity to clarify the conflict in approach by the courts to the question of how waiver is to

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1116 (Ala. Cr. App. 1984); see State v. Brittain, 38 Wash.App.2d 740 689 P.2d 1095 (1984). While the Faretta opinion does refer to the fact that Faretta made an alternate request for different counsel, 422 U.S. at 810 n.5, 95 S.Ct. at 2529 n.5, 45 L.Ed.2d at 568 n.5, there is nothing in the opinion that undercuts the notion that Faretta's primary goal, unlike Johnstone's, was to represent himself. In fact, Faretta requested counsel other than the public defender only after he was denied the opportunity to proceed pro se. Brief for Petitioner at 9-10, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

be measured. As noted, the federal courts in this case relied on the request itself. The state judge relied on whether Johnstone understood the pitfalls of that request, an approach taken by at least some other courts. Here, Johnstone repeatedly emphasized that, if forced to proceed pro se, he would do nothing in his defense. He believed, erroneously, that to proceed pro se would result in the reversal of his conviction by an appellate court and a new trial with new assigned counsel.

The approach of the state court was that a request to proceed pro se based on such a misunderstanding could scarcely be viewed as unequivocal. Simply put, because Johnstone stubbornly refused to accept the state judge's effort to explain Johnstone's mistake of

law, the request can scarcely be viewed as intelligent.*

4. Finally, the harmless error question which divided the federal courts below raises a substantial question for this Court to resolve. Without doubt, this Court has advanced in dicta both the notion that denial of a bona fide request to proceed pro se "is not amenable to 'harmless error' analysis," McKaskle v. Wiggins, 465 U.S. at 177 n.8, 104 S.Ct. at 950 n.8, 79

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*Ironically, Johnstone has been able to manipulate the review process in such a way that the Second Circuit gives him precisely the impermissible advantage he sought by using a request to proceed pro se as a tool to obtain different counsel. His desire to proceed pro se was motivated solely by the belief that, if he did so, he would obtain a reversal of his conviction and new counsel on the retrial.

L.Ed.2d at 133 n.8, supra,* and the notion that prejudice need not be shown, Flanagan v. United States, 465 U.S. 2259, 2267-2268, 104 S.Ct. 1051, 1056, 78 L.Ed.2d 288, 296 (1984). Some circuits appear to have accepted that dicta. Dorman v. Wainwright, 798 F.2d 1358, 1370 (11th Cir. 1986), cert. denied sub nom. Dugger v. Dorman, 55 U.S.L.W. 3661 (U.S. Mar. 30, 1987);

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*Despite the dicta in McKaskle, it is difficult to see how the result in that case is not anything but an acceptance of the possibility of harmless error. There, the Court analyzed whether certain failures in affording McKaskle complete pro se representation required reversal of his conviction, and concluded that it did not. Since, Johnstone, for example, gave his own summation, he received at least some pro se representation. That being so, that is another reason why the Second Circuit should not have engaged in a "bright line" rejection of harmless error analysis.

United States v. Rankin, 779 F.2d 956, 960-961 (3d Cir. 1986); see also Wilson v. Mintzes, 761 F.2d 275, 286 (6th Cir. 1985), or have otherwise rejected harmless error analysis, Bittaker v. Enomoto, 587 F.2d 400, 403 (9th Cir. 1978), cert. denied, 441 U.S. 913, 99 S.Ct. 2013, 60 L.Ed.2d 386 (1979); Chapman v. United States, 553 F.2d 886, 891-892 (5th Cir. 1977).

On the other hand, two circuits have concluded that a harmless error analysis may be applied to the wrongful acceptance of a waiver of counsel and grant of a request to proceed pro se. Richardson v. Lucas, 741 F.2d 753, 757 (5th Cir. 1984); United States v. Gipson, 693 F.2d 109, 112 (10th Cir. 1982), cert. denied, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d

455 (1983). It is difficult to see why the analysis should differ, or how harmless error can exist on the one hand, but not the other.

At times, this Court also has advanced the proposition that the Constitution permits harmless error analysis concerning all but the most fundamental of errors. Delaware v. Van Arsdall, ___ U.S. ___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Indeed, in Rushen v. Spain, 464 U.S. at 117 n.2, 104 S.Ct. at 455 n.2, 78 L.Ed.2d at 272-273 n.2, supra, for example, the Court found harmless error analysis appropriate to the right to be present and to be represented by counsel. It scarcely seems fair to set a standard

that presumes against waiver of counsel, and, indeed, requires the state to meet a heavy burden to show waiver of counsel, and then deny the possibility of harmless error. Certainly, if that is to be the case, such a question should not be determined by the dicta of McKaskle and Flanagan.

The facts of this case, itself, call into question this Court's previous dicta, and call for the Court to finally determine, on a record which lucidly presents the issue, the question of harmless error which Justice Blackmun, in his dissent in Faretta, recognized had been left unanswered by that case. 422 U.S. at 852, 95 S.Ct. at 2549, 45 L.Ed.2d at 591-592.

Indeed, to enforce a "bright line" refusal to employ "harmless error"

analysis in such situations as ours is to lose sight of the realities of the events underlying a given case. Here, the alleged error is found in the context of a collateral habeas corpus proceeding. Such a proceeding is, of course, equitable in nature and should not simply be treated as another level of appellate review. Stone v. Powell, 428 U.S. 465, 478 n.11, 96 S.Ct. 3037, 3044 n.11, 49 L.Ed.2d 1067, 1078 n.11 (1976). Further, recent opinions from this Court suggest that a growing concern in habeas corpus proceedings is whether the criminal proceedings resulted in an untrustworthy verdict.

Thus, it has been suggested, in various contexts, that habeas corpus review should consider if the verdict is reliable, Murray v. Carrier, __U.S.__,

___-___, 106 S.Ct. 2639, 2649-2650, 91 L.Ed.2d 397, 413 (1986)(procedural forfeiture); or if the petitioner has suffered "fundamental unfairness," Rose v. Lundy, 455 U.S. 509, 538, 547, 102 S.Ct. 1198, 1213, 1218, 71 L.Ed.2d 379, 400, 406 (1982) (Stevens, J., dissenting); or if the petitioner has made a "colorable" showing of factual innocence," Kuhlmann v. Wilson, ___ U.S. __, __, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364, 381 (1986) (plurality) (successive petitions). See also Storti v. Massachusetts, 183 U.S. 138, 143, 22 S.Ct. 72, 74, 46 L.Ed. 120, 124 (1901) (to achieve substantial justice is purpose of review). If, as the district judge concluded, the state's alleged mistake was harmless and the verdict was trustworthy, at a minimum the district

judge possessed the discretion not to issue the writ. That being so, the Second Circuit should not have employed a standard of review that refused to recognize that discretion, as well as the equities of this case and the possibility of harmless error.

* * * * *

Plainly, we recognize that the fate of the prosecution against Gregory Johnstone does not justify, in itself, the grant of certiorari. By seeking certiorari, we do not simply seek correction of the single wrong committed, we believe, by the Second Circuit. What we seek is vindication of the view that federal remedial action over state judicial processes should be limited to that which is necessary to right the perceived wrong. Any other

view topples the established norms of federal-state comity.

In addition, we seek clarification of the Faretta decision in the context of habeas corpus review. We ask the court to determine whether the waiver of counsel in that context is a factual or legal question and how it should be measured, and whether the equitable nature of habeas corpus permits the consideration of harmless error. The Second Circuit has ratified Johnstone's abuse of the state judiciary system. We seek relief from the only place the state can now turn.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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